

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Notice of Inquiry Concerning a Review of the	)	CC Docket No. 02-39
Equal Access and Nondiscrimination Obligations	)	
Applicable to Local Exchange Carrier	)	

**COMMENTS OF EMBARQ**

**I. INTRODUCTION AND SUMMARY.**

In the original *NOI*<sup>1</sup> for which the Commission seeks to refresh the record<sup>2</sup>, the Commission sought comment on the Independent ILECs' obligations to provide interLATA services through a separate affiliate.<sup>3</sup> The Commission is right to refresh the record as relief from these obligations is long overdue. Not only have the Bell Operating Companies been relieved of similar restrictions despite far larger long distance market shares, but competition has obviated any need for structural separation in long distance markets period.

Currently, the Independent ILECs can only provide in-region, interstate, interexchange services through structurally-separate affiliates.<sup>4</sup> This regulatory obligation is out of sync with the current marketplace, and it is inexplicable when compared to the obligations of the RBOCs.<sup>5</sup>

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<sup>1</sup> *Notice of Inquiry*, 17 FCC Rcd 4015 (2002) (“*NOI*”)

<sup>2</sup> *Parties Asked to Refresh Record Regarding Review of Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers*, 22 FCC Rcd 4553 (2007).

<sup>3</sup> *NOI* at 4023.

<sup>4</sup> *See*, Commission Rule 64.1903, 47 C.F.R. § 64.1903. The rule does allow for an exception for a pure switchless resale play.

<sup>5</sup> The last Section 272 obligation on a Regional Bell Operating Company to maintain a structurally-separate affiliate sunset on December 3, 2006, when Qwest was freed from the obligation to provide in-region, interstate, interLATA telecommunications service through a structurally separate affiliate in Arizona. *See Section 272 Sunsets for Qwest in the State of Arizona by Operation of Law on December 3, 2006, Pursuant to Section 272(f)(1)*, WC Docket

It is imperative that the Commission remove this unnecessary obligation because it imposes unnecessary costs and burdens

Currently, the FCC has a pending rulemaking docket, *In the Matter of 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules* ("Separate Affiliate Docket")<sup>6</sup>, asking whether the benefits of a separate affiliate requirement are justified. As shown herein, they are not. The Independent ILECs do not have the market power to be dominant in in-region, interstate telecommunications markets. Therefore, a structural separate affiliate requirement is not necessary to protect against harms such as cost misallocation, discrimination in the provision of access, or the imposition of a price squeeze. Accordingly, the Commission can and should act now in the *Separate Affiliate Docket* docket to eliminate Rule 64.1903 and the requirement that Independent ILECs provide in-region, interstate, interexchange telecommunications service through a structurally-separate affiliate.

## **11. BACKGROUND.**

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No. 02-112, Public Notice, 21 FCC Rcd 14157 (2006). Additionally, on February 20, 2007, Qwest was granted forbearance from dominant status when it provides in-region, interstate, interLATA telecommunications services on an integrated basis. See *In the Matter of Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As they Apply After Section 272 Sunsets*, 22 FCC Rcd 5207 (2007) ("Qwest Nondominance Order"). AT&T (including the former BellSouth) and Verizon have Petitions for similar relief pending. See *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, WC Docket No. 06-120 (filed June 2, 2006), *BellSouth Corporation's Petition for Wavier*, CC Docket No. 05-277 (filed Sept. 19, 2005), and *Petition of the Verizon Local and Long Distance Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, WC Docket No. 06-120 (filed June 2, 2006).

<sup>6</sup> The original Notice of Proposed Rulemaking is at *In the Matter of 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, 16 FCC Rcd 17270 (2001) and the Further Notice of Proposed Rulemaking in the same docket is at 18 FCC Rcd 10914 (2003).

In the *Competitive Carrier Fifth Report and Order*,<sup>7</sup> the Commission addressed the issue of Independent ILECs providing interstate services. The Commission concluded that Independent ILECs would be incented to use their position as monopoly local service providers to favor their own long distance services over those of unaffiliated IXC's. Accordingly, the Commission enacted rules to protect against cost-shifting and anti-competitive conduct by allowing an Independent ILEC's long distance affiliate to enjoy nondominant treatment only if the affiliate (i) maintained separate books of account; (ii) did not jointly own with the Independent ILEC transmission and switching facilities; and (iii) acquired services from the Independent ILEC under tariffs.<sup>8</sup> After passage of the Telecommunications Act of 1996, the Commission reviewed these rules and decided to continue to require Independent ILECs to offer long distance services through a separate affiliate.<sup>9</sup> The Commission subsequently relaxed the rules for Independent ILECs who acquired long distance services through resale by requiring only a separate division instead of a separate corporate entity.<sup>10</sup>

#### **111. INDEPENDENT ILECS ARE UNABLE TO AFFECT LONG DISTANCE COMPETITION.**

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<sup>7</sup> *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Fifth Report and Order, 98 F.C.C.2d 1191 (1984) ("*Competitive Carrier Fifth Report and Order*").

<sup>8</sup> *Id.* at 1198, ¶9.

<sup>9</sup> *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149 and 96-61, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15841-64, ¶¶143-192 (1997) ("*LEC Classification Order*").

<sup>10</sup> *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149 and 96-61, Second Order on Reconsideration and Memorandum Opinion and Order, 14 FCC Rcd 10771 (1999) ("*Second Reconsideration Order*").

Embarq and other Independent ILECs are no longer monopolies in any meaningful sense in the provision of local exchange services, facing considerable competition from cable and commercial mobile service (CMRS) providers, among others. Moreover, the Independent ILEC service areas are limited in size. Accordingly, Independent ILECs are unable to disadvantage IXC competitors in providing in-region, interstate services. This is particularly true for Embarq as its service territories are widely dispersed and largely rural. Embarq operates local service in 18 states from Florida to Washington, and Embarq is designated as a rural telephone company, under the Act in all states except Nevada.<sup>11</sup> In addition, it is much rarer for an interstate call to originate and terminate in a specific Independent ILEC's territory than with an RBOC. Dispersion lessens the potential to affect competition, meaning that the Independent ILECs have less opportunity to use a local-long distance consolidation to harm competition.<sup>12</sup> Moreover, the Independent ILECs simply do not have the scale to affect the IXC market. Out of the approximately 1,300 ILECs in the United States<sup>13</sup>, the 3 RBOCs control approximately 85% (approximately 132 million out of 157 million) of the nation's ILEC loops<sup>14</sup> located across broad and contiguous geographical areas. This leaves only about 15% of the loops to the remaining 1,297 industry carriers. The scope of the Independent ILECs' local operations is too limited to realistically allow them to hinder the overall operations of the much larger combined

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<sup>11</sup> The Act refers to the Communications Act of 1934, as amended. Rural telephone company is defined at 47 U.S.C. § 153 (37).

<sup>12</sup> *United States v. GTE Corp.*, 603 F. Supp 730, 734 (D.D.C. 1984)

<sup>13</sup> *Statistics of Communications Common Carriers*, 2004/2005 Edition, Federal Communications Commission, at p. iii.

<sup>14</sup> *Trends in Telephone Service*, Industry Analysis and Technology Division, Wireline Competition Bureau, February 2007, at Tables 7.2 and 7.3.

RBOCs/long distance competitors. Independent ILECs are simply not capable of driving a rival IXC out of a market and sustaining toll rates above competitive levels.<sup>15</sup>

As demonstrated, the differences between the Independent ILECs and the RBOCs make it far less likely that the Independent ILECs can influence or exert dominance over in-region, interstate, interexchange telecommunications. Yet increasingly, the Independent ILECs are subject to burdens that the RBOCs are not. Thus far this is most true of Qwest which has been freed from the requirement to have a structurally separate affiliate, and has been declared nondominant when it provides the service on an integrated basis. In the *Qwest Nondominance Order*, Commission stated:

The provision of interstate, interLATA telecommunications services through a section 272 separate affiliate denies Qwest the economies of scope and scale that its competitors are able to realize. Providing interstate, interLATA telecommunications services through a section 272 affiliate requires Qwest, *inter alia*, to operate independently of the BOC and maintain separate officers, directors, and employees from the BOC. These restrictions are inefficient not only because they impose additional costs (such as those for duplicative facilities), but also because they prevent Qwest from taking advantage of the economies of scope and scale associated with an integrated operation. These restrictions may also prevent Qwest and the affiliates from quickly responding to technological and marketplace developments. These restrictions and their associated costs make Qwest a less effective competitor in the market.<sup>16</sup>

These burdens and restrictions are even more onerous for the Independent ILECs who compete with large national cable companies for local and long distance bundles, and with AT&T, Verizon, and Qwest, the largest telephone countries in the nation, for interexchange services.

In the past, the Commission often regulated the Independent ILECs with a less heavy hand than the RBOCs, certainly not with the heavier hand that is used today. For instance, the

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<sup>15</sup> Congress so much as acknowledged this in the '96 Act by distinguishing between the BOCs and the Independent ILECs in crafting long distance entry provisions. See 47 USC §§ 271-272.

<sup>16</sup> *Qwest Dominance Order* at 5213 [Footnotes omitted.]

*Computer II Final Decision* is the order in the *Computer Inquiry*<sup>17</sup> proceedings recognizing the difference between Embarq” and other small, rural ILECs and the much larger RBOCs (including what is now Verizon). In the *Computer II Final Decision* the Commission determined that structural separation was not necessary in the provision of enhanced services for carriers other than AT&T (which then included the RBOCs) and GTE, largely because the smaller carriers, such as Embarq, could not engage in anti-competitive behavior in the nation-wide enhanced services market:

A carrier’s ability and incentive to engage in anticompetitive conduct in adjacent markets must be measured with some recognition of the parameters of those markets. Thus, what must be recognized is that while market power in the provision of telephone service may be appropriately measured within both local and national geographic markets, the provision of enhanced services and CPE has been largely undertaken, and increasingly so, on a national basis. These services, in essence, are and will continue to be directed at residential and business users spread over broad geographical markets. A carrier such as AT&T, with a nationwide network of transmission systems and local distribution plant in major metropolitan areas, could obviously harm a competitor through its control over these facilities in an anti-competitive manner. GTE, serving over 8% of the nation’s telephones (see Table 1) and several major population and business centers, would also have significant ability to engage in predatory or discriminatory practices n87 On the other hand, a carrier like Continental, with most of its resources concentrated in rural distribution plant, would not be able to deny competitive access to any significant portion of the potential customers for

<sup>17</sup> The *Computer Inquiry* is a series of FCC proceedings and decisions investigating the provisions of enhanced services by facilities based wireline common carriers. See generally, Final Decision and Order, *Regulatory and Policy Problems Presented by the interdependence of Computer and Communications Services and Facilities (Computer I)*, 28 F.C.C.2d 267 (1971); Final Decision, *Amendment of Section 64.704 of the Commission’s Rules and Regulations (“Computer II Final Decision”)*; Report and Order, *Computer III Further Remand Proceedings; Bell Operating Co. Provision of Enhanced Services; 1998 Biennial Review – Review of Computer III and ONA Safeguards and Requirements*, 14 FCC Rcd 4280 (1999) (collectively, “*Computer Inquiry*”).

<sup>18</sup> All of the Embarq Local Operating Companies, except for the Nevada operations of Central Telephone Company, are Rural Telephone Companies as that term is defined in Section 3(37) of the Act (47 U.S.C. § 153(37)).

enhanced services. The diminished likelihood of success in such attempts also serves to diminish the incentive to try.”

This same recognition that the smaller ILECs cannot engage in anti-competitive behavior in the enhanced services market led the Commission in the *Computer III Phase II Order*<sup>20</sup> to refuse the imposition of CEI/ONA nonstructural safeguard obligations on any carriers other than AT&T and the RBOCs: “...we decline at this time to apply the nonstructural safeguards established in the *Phase I Order* to the enhanced service operations of the Independents. We conclude that the ITCs are sufficiently different from the BOCs to warrant different regulatory treatment.”<sup>21</sup> Even the former GTE, which at the time was much larger than Embarq, came in for the different treatment because of its inability to engage in anti-competitive behavior in a nation-wide enhanced services market.

GTE is the ITC most like a BOC, yet the record reveals that it has features that clearly distinguish it. For example, an analysis of GTE’s service areas demonstrates that although in the aggregate GTE is similar in size to each BOC, unlike the BOCs, its service areas are distributed nationwide in a large number of noncontiguous geographical areas. This circumstance effectively prevents GTE from exercising monopoly control in large regions of the country, comparable to those served by the BOCs. Also, compared to the BOCs, GTE service areas tend to be smaller (fewer access lines per exchange), less densely populated (fewer access lines per square mile), and they contain a smaller percentage of business customers. ... These factors indicate that GTE has more limited opportunities than the BOCs to use bottleneck control over local exchange facilities for anticompetitive purposes in the enhanced services marketplace to the detriment of competitive providers and their customers.<sup>22</sup>

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<sup>19</sup> *Computer II Final Decision* at ¶ 217.

<sup>20</sup> *In the Matters of Amendment to Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry) and Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorizations Thereof Communications Protocols under Section 64.702 of the Commission’s Rules and Regulations*, CC Docket No. 85-229, Report and Order, 2 FCC Rcd 3072 (1987) (“*Computer II Phase II Order*”).

<sup>21</sup> *Id.*, at ¶ 8.

<sup>22</sup> *Id.*, at ¶ 203.

These statements apply even more for Embarq and the other Independent ILECs than for the former GTE and are equally as applicable to in-region, interstate, interexchange telecommunications services.

**IV. THE SEPARATE AFFILIATE RULES ARE: NOT NEEDED TO PROTECT AGAINST POTENTIAL HARM FROM INDEPENDENT ILECS.**

Current Commission rules adequately protect against concerns connected with Independent ILEC provision of long distance service without requiring Independent ILECs to provide such service through a separate affiliate.

**A. The Separate Affiliate Rules Are Not Necessary To Combat Cost Misallocation.**

The Commission's cost allocation rules adequately cover this issue by requiring that Independent ILECs separate regulated costs (e.g. costs attributable to local service) from nonregulated costs (e.g. costs attributable to interstate toll service).<sup>23</sup> These cost allocation rules contain specific principles for Independent ILECs to follow in determining the proper allocation of costs between regulated and nonregulated activities. Further, Rule 64.901(c) specifically states that a carrier "may not use services that are not competitive to subsidize services subject to competition."<sup>24</sup>

The cost allocation rules accomplish the same aim as the separate affiliate rules. The only difference is that the existence of a separate affiliate arguably makes transactions marginally more visible. Over time, this additional layer of visibility has proven unnecessary because there have been virtually no substantiated complaints against Independent ILECs on this issue. Opponents may argue that, in the absence of a separate affiliate, an Independent ILEC

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<sup>23</sup> See 47 CFR §64.901.

<sup>24</sup> This rule reiterates language in Section 254(k) of the Act.



will violate the cost allocation rules, because an investigation will be more difficult. Given the Commission's powers to hear complaints, grant damages and injunctive relief, and impose sanctions and forfeitures, an Independent ILEC would be unwise to risk such penalties in exchange for the relatively small payoff to be gained in the long distance market.<sup>25</sup>

**B. A Separate Affiliate Is Not Necessary To Restrain Discrimination in the Provision of Access Services.**

The separate affiliate rules are not needed to prevent Independent ILECs from engaging in discriminatory behavior, such as providing poorer quality access or imposing unnecessary delays in providing access service. This behavior is constrained by the equal access rules, which apply to the Independent ILECs.<sup>26</sup> Further, the '96 Act preserved the same equal access and non-discriminatory interconnection restrictions and obligations that existed prior to the passage of the '96 Act.<sup>27</sup> Again, there have been virtually no complaints of discriminatory behavior against the Independent ILECs. There is simply no good reason to keep the separate affiliate rules in place to curb violations that experience has shown are not likely to occur and where the conduct involved is addressed in other statutory provisions and other Commission rules.

**C. A Separate Affiliate Requirement is Unnecessary to Prevent Price Squeezes.**

Requiring a separate affiliate is not an effective method in stopping price squeeze attempts. Other regulatory tools are more effective in this regard. Violations of Sections 201 and 202 can be addressed through the complaint process and enforcement of antitrust laws.<sup>28</sup>

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<sup>25</sup> See 47 U.S.C. §§ 154(i), 206-209, and 503.

<sup>26</sup> *LEC Classification Order* at 15855,1172.

<sup>27</sup> 47 U.S.C. § 251(g).

<sup>28</sup> *LEC Classification Order* at 15831, ¶128.

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Moreover, given the existence of the Commission's cost accounting rules, a separate subsidiary requirement in this context is superfluous in preventing or detecting such conduct.

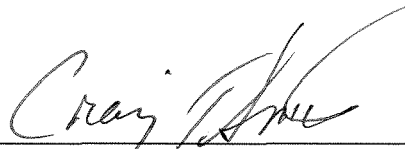
**V. CONCLUSION.**

The Independent ILECs do not have the market power to be dominant in the in-region, interstate telecommunications market and a structural separate affiliate requirement is not necessary to protect against harms such as cost misallocation, discrimination in the provision of access, or the imposition of a price squeeze. Accordingly, the Commission can and should act now in the *Separate Affiliate Docket* proceeding to eliminate Commission Rule 64.1903 and the requirement for Independent ILECs to provide in-region, interstate, interexchange telecommunications service through a structurally separate affiliate.

Respectfully submitted,

**Embarq**

By: \_\_\_\_\_



David Bartlett  
Jeffrey S. Lanning  
701 Pennsylvania Ave, NW, Suite 820  
Washington, DC 20004  
(202) 393-7113

Craig T. Smith  
5454 W. 110<sup>th</sup> Street  
Overland Park, KS 66211  
(913) 345-6691

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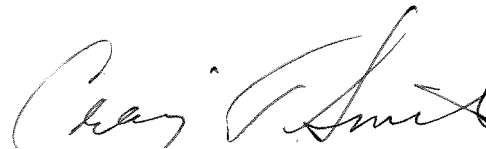
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of foregoing, Comments of Embarq, was delivered by electronic mail on this 29<sup>th</sup> day of May 2007 to the parties listed below.

Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room TW-A325  
Washington, DC 20554

Janice Myles  
Competition Policy Division, Wireline  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 5-C140  
Washington, DC 20554  
[Janice.Myles@fcc.gov](mailto:Janice.Myles@fcc.gov)

Best Copy and Printing, Inc. (BCPI)  
445 12<sup>th</sup> Street, SW, Room CY-B402  
Washington, DC 20554  
[fcc@bcpiweb.com](mailto:fcc@bcpiweb.com)



Craig T. Smith'